

**In the United States Court of Federal Claims**  
**OFFICE OF SPECIAL MASTERS**

No. 09-150V  
Filed: December 21, 2011  
Unpublished

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VALERIE SOTO, as parent and legal  
guardian of YVETTE DIAZ, a minor,

Petitioner,

v.

SECRETARY OF THE DEPARTMENT  
OF HEALTH AND HUMAN SERVICES,

Respondent.

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Interim attorneys' fees and costs

*Lorraine J. Mansfield, Law Office of Lorraine Mansfield, Las Vegas, NV, for Petitioner.*  
*Lisa Ann Watts, U.S. Department of Justice, Washington, D.C., for Respondent.*

**ATTORNEY'S FEES AND COSTS DECISION<sup>1</sup>**

**GOLKIEWICZ**, Special Master.

On November 22, 2011, petitioner filed a Request for Interim Attorney Fees and Costs. P Request for Interim Attorney Fees and Costs, filed Nov. 22, 2011 [hereinafter "Interim Request" or "Int. Req."]. In the Interim Request, petitioner requests attorney fees from the inception of the case until November 21, 2011, at a billing rate of \$250.00 per hour, totaling \$18,575.00; and \$303.59 in costs related to postage, photocopying and the Petition filing fee. Int. Req. at 1-6. Petitioner does not provide any argumentation justifying an interim award. Petitioner also filed a General Order #9 Statement, noting that petitioner herself has not incurred costs related to this case. *Id.* at 7. The time for response or objection was December 9, 2011.

On December 16, 2011, respondent filed her response. R Position on Petitioner's Request for Interim Fees and Costs, filed Dec. 16, 2011 [hereinafter "Response" or "R Resp."].

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<sup>1</sup> The undersigned intends to post this decision on the website for the United States Court of Federal Claims, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). **As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, the entire decision will be available to the public. Id. Any motion for redaction must be filed by no later than fourteen (14) days after filing date of this filing. Further, consistent with the statutory requirement, a motion for redaction must include a proposed redacted decision, order, ruling, etc.**

Respondent objects to an interim award of fees and costs based on her position that the Act does not authorize an award at this stage of the case and that petitioner fails to demonstrate the factors discussed in Avera justifying an interim award. R Resp. at 1. Respondent's first argument, that the procedural posture of this case does not allow an interim award, is one the Office of Special Masters is familiar with and has been universally rejected. See R Resp. at 1, n. 1 (citing cases rejecting respondent's statutory argument); see, e.g., McKellar v. Sec'y of the Dept. of Health & Human Servs., No. 09-841, 2011 WL 5925323 (Fed. Cl. Nov. 4, 2011)(citing Avera and Shaw v. Sec'y of the Dept. of Health & Human Servs., 609 F.3d 1372 (Fed. Cir. 2010), to find awarding interim fees and costs allowable prior to an entitlement decision). Respondent notes that she does not elect to press this argument in this particular case. R Resp. at 1, n. 1. Petitioner's good faith and reasonable basis are not challenged regarding this request for fees and costs.

Respondent's second and main argument is that petitioner has not demonstrated any of the factors discussed in the Federal Circuit's Avera v. Sec'y of the Dept. of Health & Human Servs., 515 F.3d 1343 (Fed. Cir. 2008). These factors include: "whether the case had involved protracted proceedings, whether costly experts had been retained, or whether the petitioner had suffered undue hardship." R Resp. at 3 (citing Avera, 515 F.3d at 1352). Respondent argues that proceedings have not been protracted, the requested fees do not include costly expert fees or other significant expenses, and there has been no showing of undue hardship. R Resp. at 3-5 ("As the party seeking compensation under the Act, petitioner, and not her counsel, must show an undue hardship in order for interim fees to be available under Avera.").

Without waiving her objections, respondent notes that the amount of the requested attorney's fees and costs are not unreasonable for proceedings on this Petition. R Resp. at 4-5.

On December 16, 2011, petitioner filed a Reply to Respondent's Position on Petitioner's Request for Interim Fees and Costs [hereinafter "Reply" or "P Reply"]. Petitioner notes the filing due date for a response to her Interim Request and that respondent filed after this date. "Consequently, the Court should consider Petitioner's Request as unopposed." P Reply.

Regarding the factors discussed in Avera, the undersigned agrees with respondent that an award of interim fees and costs is not warranted at this juncture. Regardless of whether the undersigned considers respondent's late-filed Response, "the Special Master has an independent responsibility to satisfy himself that the fee award is appropriate and not limited to endorsing or rejecting respondent's critique." Duncan v. Sec'y of the Dept. of Health & Human Servs., No. 99-455, 2008 WL 4743493 (Fed. Cl. 2008).

This case began on March 10, 2009. Petitioner was filing medical records up until March 5, 2010. P Additional Documentation, medical records, filed Mar. 5, 2010. Thereafter, petitioner filed an expert report and respondent subsequently filed her Rule 4(c) Report and responsive expert report. P Expert Report, filed Jun. 22, 2010; R Report, filed Sept. 10, 2010; R Expert Report, filed Sept. 10, 2010. Following this, the parties discussed that many factual issues were in contention. Order, filed Oct. 18, 2010. In light of petitioner's allegation not being supported by the contemporaneous medical records, the reasonable basis for continuing the claim was questioned. Id. Petitioner requested time to follow up with an expert regarding responses to the respondent's filings. P Status Report, filed Jan. 18, 2011. Thereafter, petitioner's expert suggested a muscle biopsy was necessary for her response and nearly one year passed with petitioner endeavoring to have the testing done. P Status Report, filed Feb. 16, 2011; P Status

Report, filed Mar. 21, 2011; P First Amended Status Report, filed Apr. 20, 2011, P Status Report, filed Jul. 19, 2011. Ultimately, petitioner sought the muscle biopsy to determine whether a mitochondrial defect is present in Yvette, affecting how the vaccine allegedly may have caused her harm. See Order, filed Jul. 28, 2011. During the July 27, 2011 Status Conference, it was noted that there remained factual discrepancies to resolve regardless of the information to be gleaned from the muscle biopsy. Id.

Knowing and understanding the answer to [the factual] question is critical for two reasons: 1) If the factual issues are a central component to the experts' opinions, the genetic testing, if it is being performed solely for this litigation, should not proceed until the factual issues are clarified, and 2) if the factual issues are central to the experts' opinions, a fact hearing and subsequent fact determination by the undersigned should take place prior to any further work by the experts. Petitioner agreed to discuss this issue with the experts and report to the court.

Order, filed Jul. 28, 2010. Petitioner's Status Report on August 11, 2011, confirmed that her expert's opinion required both the mitochondrial defect diagnosis **and** the acute reaction found in the petitioner's accounts, which are not contained in the contemporaneous medical records. A fact Hearing was held to discuss the factual discrepancies. Minute Entry, filed Nov. 4, 2011. The Interim Request was filed shortly after the November 3, 2011 Hearing.

Review of this case and in the undersigned's experience with cases in the Program, this case does not warrant interim fees at this time. Proceedings have not been particularly protracted; although, approximately one year was spent by petitioner collecting medical records and almost one more year was spent by petitioner seeking medical testing to support her allegations of vaccine causation. The fees and costs requested do not pertain to costly experts or, as respondent stated, other significant expenditures. Finally, petitioner has not evidenced any other undue hardship, which would militate toward an interim award of attorney fees and costs.

As interpreted in McKellar, "we view Avera to mean that some special showing is necessary to warrant interim fees, including but not limited to the delineated factors of protracted proceedings, costly experts, or undue hardship. If mere good faith and reasonable basis were all that is necessary, the Avera factors become superfluous and interim fees would be the norm." McKellar, No. 09-841V, slip op. at 7. As Judge Bruggink found, "there is not a presumption of entitlement to interim fees." Id. Petitioner has not made a showing that an interim award is appropriate at this point of her case.

Petitioner's Interim Request for Attorney Fees and Costs is **denied**. The Clerk of the Court is directed to enter judgment accordingly.

**IT IS SO ORDERED.**

s/ Gary J. Golkiewicz  
Gary J. Golkiewicz  
Special Master